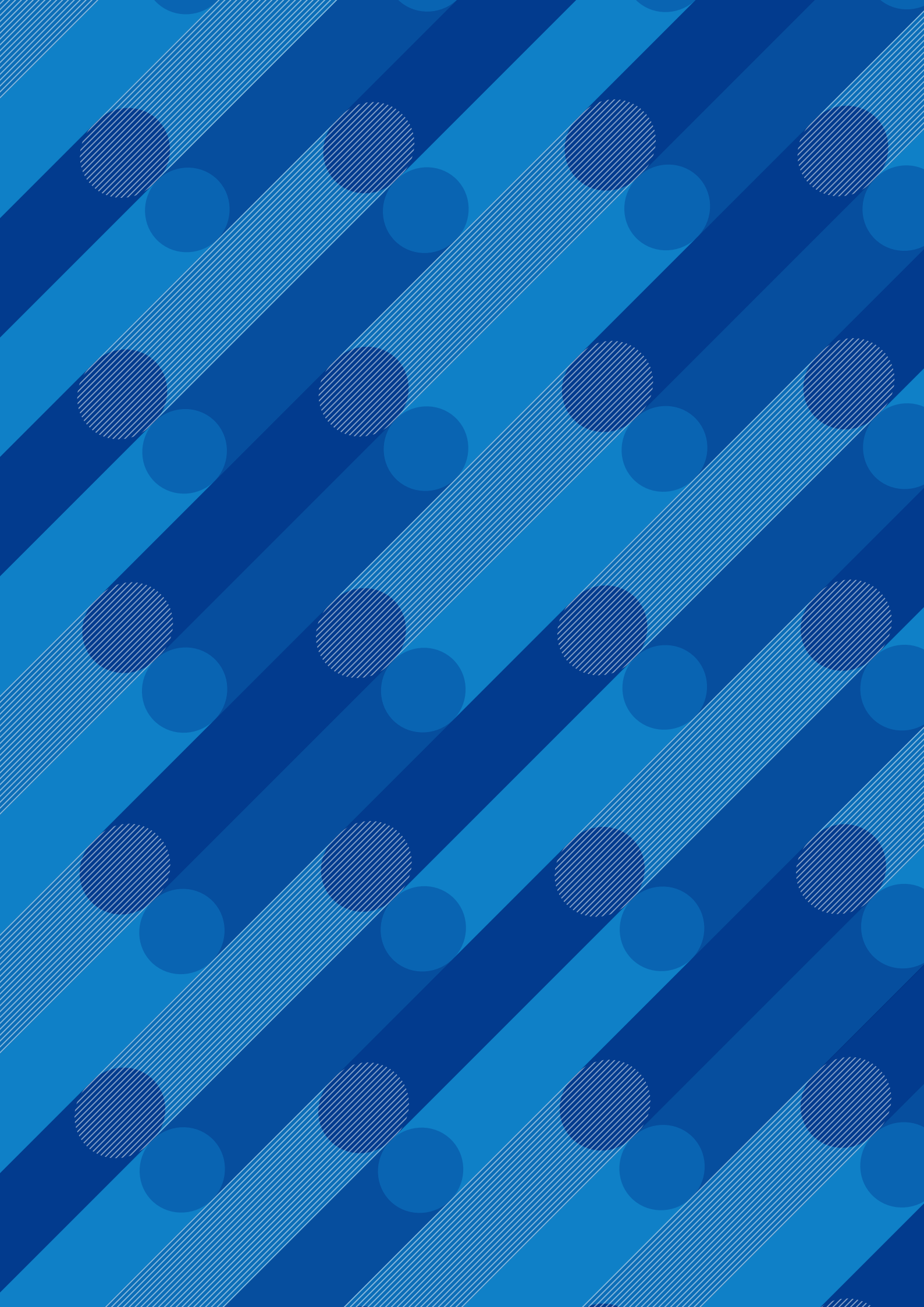




HERBERT  
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# CRISIS MANAGEMENT FOR UK LISTED COMPANIES





# Contents

- 02 How Herbert Smith Freehills LLP can help UK listed companies facing crises
  - Establishment and management of response team
  - Market disclosures and communications; stakeholder engagement
  - Internal investigations
  - Disputes/class actions
  - Regulator engagement and investigations
  - Insurance
  - Restructuring, turnaround and insolvency
  - Directors' duties
  - Employment
- 04 Our team and credentials
- 08 Notes

# How Herbert Smith Freehills LLP can help UK listed companies facing crises

The risk of significant adverse events are ever present in the corporate landscape, including for listed companies. When a crisis does strike, the consequences can be immediate and severe, with significant impacts on share price.

We can immediately assemble a bespoke team to be by your side in those crucial first hours and days of a crisis – supporting you to identify and respond quickly to mitigate risks and meet your stakeholder expectations. We can also assist in crisis prevention and preparedness.

We have years of experience helping major listed companies in a wide range of sectors, including financial services, oil and gas, telecommunications and IT.

Our team can advise on the full spectrum of legal and regulatory issues that can arise following a crisis, including:

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## **Establishment and management of response team**

A crucial first step is the establishment and management of the team responsible for responding to the crisis. Listed companies will need to consider how, when and where to pull together the range of technical, legal and other specialist advisers, and how to allocate internal responsibilities and corporate governance. Ensuring that internal stakeholders are appropriately briefed at an early stage is critical in managing the first few days.

## **Market disclosures and communications; stakeholder engagement**

Listed companies will need to keep their market announcement obligations under close review, but equally will wish to develop a comprehensive communications strategy at an early stage, both external and internal. The PR strategy should be appropriately aligned with the relevant legal framework, to ensure compliance with issuers' regulatory obligations. Early engagement with key stakeholders (for example, shareholders, regulators, governments, industry bodies, lenders, employees, insurers, auditors) should be a priority. It may also be necessary to consider the extent to which a crisis impacts on a listed company's contractual arrangements, including whether the crisis may give rise to breaches.

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## **Internal investigations**

A prompt and thorough internal investigation can be crucial when serious misconduct is suspected, to enable issuers to adopt an informed position on issues such as potential regulatory, PR, insurance, employment and litigation exposure, and to facilitate compliance with its market announcement obligations. A key consideration for any listed company facing a crisis will be the nature and extent of any internal investigation undertaken, including how legal professional privilege can best be preserved and the extent to which evidence can be gathered from likely witnesses.

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## **Disputes/class actions**

A listed company facing a crisis should seek to assess potential claims by third parties at an early stage. For example, shareholder groups may threaten or bring class actions against an issuer and/or its directors, principally under s90 and s90A FSMA. Organisations should at an early stage consider the preservation of evidence and other fact-gathering, issues relating to legal professional privilege, and the availability of interim relief or other urgent/protective measures.

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**Regulator engagement and investigations**

It will be necessary to consider the extent to which engagement with and/or notification to relevant regulators and/or government bodies is required. The possibility of external investigations into misconduct should be considered at an early stage and advice should be sought on cooperation with regulatory and, where relevant, law enforcement bodies. A strategic approach to dealing with the relevant authorities is important in both managing any enquiries and mitigating other potential consequences such as reputational damage.

**Insurance**

Insurance should not be an afterthought. A listed company will incur a variety of losses and costs and potentially face investigations, enquiries and claims from different bodies and third parties in the immediate aftermath of a crisis and beyond. It is crucial that insurance coverage is assessed and the correct steps are taken to communicate with insurers promptly and comply with policy terms in managing the crisis in order to preserve and maximise insurance recoveries. Communication with other relevant stakeholders, such as auditors, will also require early consideration.

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**Restructuring, turnaround and insolvency**

The market disclosure requirements for a public company mean that any financial default, threat of solvency or discussions with financial creditors will almost certainly require early market disclosure. Controlling the messaging relating to a potential restructuring will be crucial in order to avoid a significant loss of confidence amongst key stakeholders and suppliers particularly if that loss of confidence could lead to the insolvency of the company. The board of a public company will need early stage advice on matters as diverse as legal duties of directors; market disclosure requirement; financial and restructuring options; public relations and employment advice.

**Directors' duties**

To respond proactively to a crisis, the board of a listed company need a practical understanding of their statutory duties as directors and what factors they must consider when exercising their powers. Crisis situations often create conflict situations between group companies and it is important that boards understand exactly in whose interests they must act. In addition, individual directors may need guidance as to their personal liability when considering their response to a crisis.

The possibility of insolvency will increase the onus on directors to both take account of the interests of creditors and minimise the potential loss that those creditors may face if the company ultimately fails.

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**Employment**

In our experience, all crisis management matters give rise to potential employment and data privacy issues, including how and when to obtain and review certain documentation, how and when to respond to subject access (and other data) requests, investigating matters without falling foul of whistleblowing legislation, recovering and preventing misuse of confidential data, how and when to suspend and dismiss individuals and dealing with employment and data related litigation and related publicity.

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# Our team and credentials

## Corporate and listed company advice



**Greg Mulley**  
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Our corporate group has particular experience in advising listed clients on their most complex issues, including in crisis situations which could potentially impact an issuer's status as a listed company.

Our expertise spans the whole cycle of a crisis situation, ranging from the immediate actions required under the Listing Rules, disclosure obligations and director's duties, right the way through to advising on what the long term solutions may be. We have a wealth of experience advising listed clients in relation to restructurings, including capital reorganisation, equity capital raisings, class 1 disposals as well as responding to takeover approaches (hostile or otherwise) and activist shareholder.



**Gavin Davies**  
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Our recent experience includes:

- Advising in relation to the global insolvency and sale of the Nortel group, which involved numerous applications to the English, US and Canadian courts, as well as bespoke arbitration proceedings between the global Nortel companies.
- Acting for BP on various aspects of the Gulf of Mexico disaster.
- Advising a major corporation in relation to Twitter trolling, cyber-squatting and a cyber-attack on its website and the associated potential negative publicity.
- CPP Group Plc on the Class 1 disposal of its North American business, amendment and extension of its revolving loan facility and takeover approach by its majority shareholder. Advice also in relation to the FCA investigation into alleged mis-selling by one of CPP's regulated UK insurance intermediaries, and its customer redress exercise by way of a scheme of arrangement.



## Restructuring, turnaround and insolvency



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We offer leading expertise to listed businesses that are impacted by the continuing uncertainties in global markets. We are trusted advisors to some of the largest and most high profile debtors, lenders, directors and insolvency practitioners, offering vast restructuring and insolvency expertise, alongside fully integrated contentious practice support.



**John Whiteoak**  
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Our integrated restructuring, insolvency and disputes offering is a particular strength of the firm, allowing us to quickly mobilise highly-skilled, multi-disciplinary and multi-jurisdictional teams. As such, we are trusted by a wide range of clients across many sectors.

Our recent experience includes:

- Advising Lonmin plc in relation to the refinancing and restructuring of its US\$360m facility agreement and the ZAR2bn South African law facilities agreement, conditional on a US\$400m rescue rights issue.
- Advising CPP Limited, a subsidiary of CPP Group PLC, in relation to its high profile Scheme of Arrangement.
- Advising the Administrators of the Nortel Companies based in EMEA, in relation to the international insolvency of the Toronto Stock Exchange listed Nortel Group, one of the largest and most complex multinational insolvencies of all time.
- Advising certain of the directors of Carillion PLC, following the collapse of that significant construction and outsourcing group.



**Natasha Johnson**  
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## Corporate crime and investigations



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Our market leading global Corporate Crime and Investigations practice acts on domestic and international regulatory and law enforcement investigations and prosecutions. It also advises across all corporate crime issues, including bribery and corruption, sanctions, fraud, money-laundering, tax-evasion, insider dealing, market manipulation and other corporate misconduct. The team, based across our global offices, has dealt with law enforcement agencies and regulators including the US DoJ and SEC, the UK's SFO and FCA, Hong Kong's ICAC and SFC, Singapore's CPIB and MAS, and the Australian CDPP, AFP and ASIC.

Our recent experience includes:

- A financial institution in a multi-jurisdictional FCPA investigation, providing advice across eight jurisdictions and involving multiple regulators
- ICBC Standard Bank plc in respect of its entry into the UK's first deferred prosecution agreement following UK and US investigations into suspected bribery in Africa.
- A listed company in relation to an SFO investigation into its previous business and accounting practices.



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## Our team and credentials (continued)

### Disputes/class actions



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**Kirsten Massey**  
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We are the leading firm in the UK for defending class actions, including actual or threatened proceedings. Our class action specialists help clients to navigate this evolving and complex area of law. We have acted in a significant number of the largest and most complex class actions in recent years. Our class action expertise, combined with our understanding of one of the drivers of this type of litigation (the litigation funding market) means that we are uniquely placed to assist you. As an illustration of our market leading expertise in this area, Harry Edwards and Kirsten Massey are co-authors of the authoritative textbook in this area, *Class Actions in England and Wales*.

Combining subject matter and sector expertise with the services of our unique Global Advocacy Group enables us to minimise the commercial and reputational effect a dispute can have on your business.

Our recent experience includes:

- Advising Lloyds Banking Group and former directors in connection with a class action brought by shareholders relating to the acquisition of HBOS by Lloyds TSB.
- Advising RBS Group on a range of regulatory and litigation issues stemming from the 2008 global banking crisis, including defending class actions brought under s90 FSMA by various shareholder and investor groups in connection with the Group's 2008 Rights Issue.
- Advising a listed company in relation to a threatened class action under s90A FSMA arising out of the reinstatement of its annual report and accounts in 2015.



## Insurance



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**Greig Anderson**  
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Our top-tier insurance practice has extensive experience of working with corporate policyholders to protect their insurance coverage and maximise recoveries in a crisis under the variety of policies that may be engaged including Cyber, Crime, Professional Indemnity, Directors & Officers, and Public Liability and Property Damage/Business Interruption. We can provide immediate assistance to ensure the insurance position is protected as well as ongoing advice on coverage and claim project management. If a coverage dispute arises, we are leading specialists in the resolution of major claims and the use of claims advocacy to secure appropriate settlement of insurance claims using the full range of dispute resolution procedures including litigation, arbitration and all the forms of Alternative Dispute Resolution.

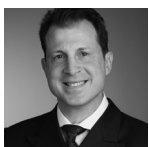
Our recent experience includes:

- Advising on major cyber insurance claims under specialist cyber policies.
- Assisting major financial institutions on claims under their D&O, crime and civil liability insurances for significant losses arising out of the global financial crisis, including a major "Side C" D&O insurance securities claim thought to be one of the largest in the London market.
- Advising certain of the directors of a major PLC on D&O insurance coverage for various investigations, enquires and third party claims following its collapse.

## Employment



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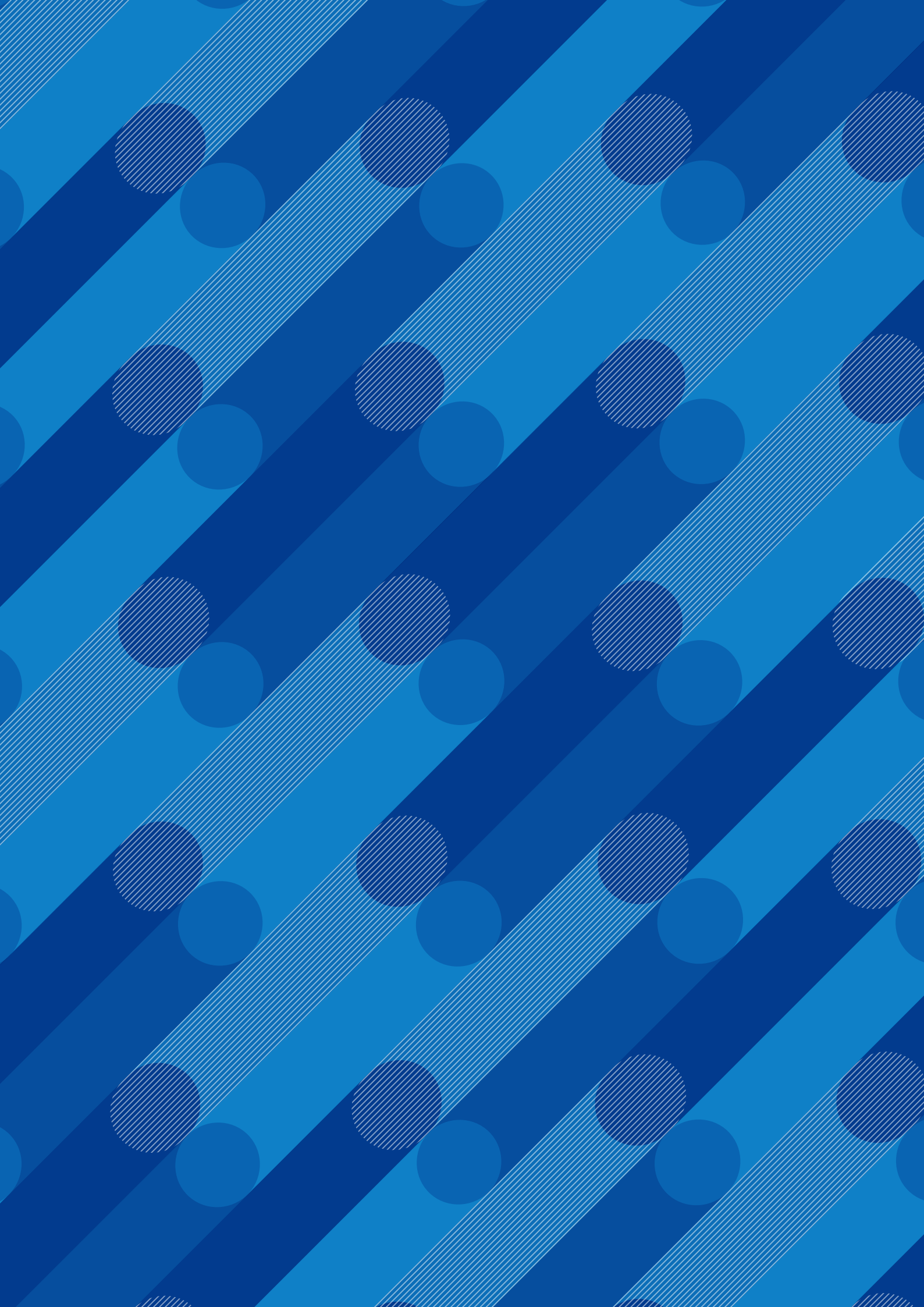
Our market-leading employment group has considerable experience of advising listed companies on their most complex and important matters, often arising out of actual or potential business crises such as data theft, bribery/corruption, fraud, insolvency situations and #metoo issues including board level and other senior departures. Our expert team works with clients and other specialist advisers on matters including dealing with whistleblowing concerns, the employment and data privacy aspects of internal, external and regulator-led investigations, board-level restructuring, defending legal proceedings brought by or on behalf of employees and, where appropriate, bringing legal proceedings against employees.

Our recent experience includes:

- Advising a significant listed financial services firm on alleged historic mis-selling issues.
- Advising an international listed company in the FCMG sector on alleged bribery concerns in its overseas operations.
- Advising an international listed chemicals company on an investigation into alleged fraud and next steps.

# Notes

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